IN THE

SUPREME COURT OF THE UNITED STATES

October Term - 1978

No. 78-1929

EUGENE BRODY,

Petitioner,

-vs-

FRANCIS MONTALBANO, FRANCES MONTALBANO, VIRGINIA WESTPHAL, DORIS SCOBEY and FRED J. SCOBEY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE UNITED STATES

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This is an action for Malicious Prosecution, Libel, Conspiracy to Interfere with Prospective Economic Advantage, Conspiracy to Commit Libel and Slander, and Intentional Infliction of Emotional Distress, brought by a public school administrator.[1] The lawsuit was predicated upon a series of charges and proceedings brought against petitioner by parents of students of the Junior High School where he served as Vice-Principal.

1 Petitioner's First Amended Complaint, CT, pages 52--79

OPINION BELOW

The Opinion of the Court of Appeal, Second Appellate District of California, is attached hereto as Appendix "A", and is reported at 87 C. App.3d 725, 151 C.Rptr. 206. The Notice from the California Supreme Court, denying hearing to review that decision, is attached hereto as Appendix "B".

JURISDICTION

The decision of the Court of Appeal was entered on December 22, 1978. A timely Petition for Hearing before the California Supreme Court was filed, and the same was denied on March 29, 1979. This Petition for Writ of Certiorari is filed within ninety-days from said date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1257 (3).

QUESTIONS PRESENTED

1. Whether a Motion for Directed Verdict against the plaintiff in a Malicious Prosecution case constitutes a denial of his Constitutional rights to due process of law, or a denial of his Constitutional right to the equal protection of the law, in light of State law and precedent granting such cause of action to all others where the Prosecution in question was before a tribunal

having plenary power to affect the substantial rights of the plaintiff.

2. Whether a Motion for Directed Verdict against the plaintiff in a defamation case constitutes a denial of his Constitutional right to due process of law, or a denial of his Constitutional right to the equal protection of the law, in light of State law and precedent granting such cause of action to all others where the libel in question was published beyond the privilged official proceeding involved.

3. Whether a Motion for Directed Verdict against the plaintiff in a Conspiracy to Interfere with Prospective Economic Advantage action constitutes a denial of his Constitutional right to due process of law, or a denial of his Constitutoinal right to the equal protection of the law, where the defendants used their privilege to defame, and other methods, for their expressed purpose of preventing plaintiff from pursuing his lawful occupation.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the United States Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition

the Government for a redress of grievances."

Fourteenth Amendment to the United States Constitution:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Material Facts

There is no dispute as to the facts before the Trial Court at the time of its directed verdicts. The most relevant evidence is reviewed by the Appellate Opinion annexed to this Petition as Appendix "A". Petitioner therefore summarizes that evidence in abbreviated narrative form.

Petitioner was employed within the City of Los Angeles public school system, first as a teacher, then as a school administrator, for some 20 years prior to the events of this lawsuit.

In August of 1971, he was assigned to the Le Conte Junior High School as its Boys' Vice Principal,

and remained in such office through 1972 and 1973. On June 8, 1972, respondents' sons[2] and others were involved in a hazing incident on the school premises wherein another student, one James Grant, was beaten into unconsciousness. Petitioner called the police at the request of the injured boy's parents. The two officers who responded to the call questioned the boys and arrested respondents' sons and another student. The boys were released to their parents for home discipline, and no formal criminal charges were instituted. Each boy was suspended for a short period of time and the incident ended.

Thereafter, respondents met together at their several homes from time to time during the ensuing year. They candidly admitted that the common plan and purpose of such meetings, and of their various letters and complaints concerning petitioner, was to have him removed from his employment.

They wrote a letter to the Board of Education on July 3, 1972, wherein they accused petitioner of "incompetency and unprofessionalism", and demanded "that he be removed from his present position and be disqualified from holding any administrative post in the Los Angeles City school system which involved discretion or control of students".

Respondents further met with the school prin-

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[2] Paul Westphal, Jr., James Scobey, and David Montalbano.

cipal to press their complaints against the petitioner, and continued with an exchange of letters between themselves and the Board of Education pressing their demands for the petitioner's dismissal. The Board investigated the charges and wrote to respondents on October 16, 1972, stating in substance that there was nothing to indicate that petitioner had acted improperly and that the matter would be considered closed unless reopened by further request. Respondents made such further request and persisted in their efforts to have petitioner removed from his employment, culminating in the filing of a formal complaint with the Board of Education on April 18, 1973, which came to hearing on June 8, 1973.

That complaint was verified by all respondents, and charged petitioner with incompetence, deliberate falsifications, irrational judgment, racial bias, and unprofessional conduct. The complaint further alleged that petitioner caused the arrest of their sons, when he was aware that "James Grant had not been injured", that the arrest was not warranted, and that petitioner insisted that James Grant sign a criminal complaint against their sons. And respondents alleged that petitioner attempted to induce Mr. and Mrs. Grant to bring civil suit against defendants "because defendants were causing him difficulty", and that such suit should be

brought to "get them off his back." But respondents' complaint was silent as to the beating administered to the Grant boy, rendering him unconscious, and as to his prior concussion, merely referring to the incident as "horseplay", involving "no malicious attack" and "no weapons".

The five-page complaint concluded with the demand that petitioner "be removed from his position as vice principal at Le Conte Junior High School and dismissed for cause relative to incompetence and fitness to hold such position." The complaint also falsely charged the petitioner with irrational and hysterical conduct, as well as improper administration of his office, in violation of state law and of the rights of their sons.[3]

None of the defamatory allegations of the complaint were true. The police made the arrest, not the petitioner, and did so as the result of their own investigation without consulting the petitioner. Petitioner did not urge James Grant to sign a criminal complaint, nor did he attempt to induce the parents of the Grant boy to file a civil suit against respondents, and all of the demeaning and derogatory allegations of misconduct were false and fabricated.

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[3] (Pl. Ex. 12; R.94, 94.)

The hearing was identified as a "Rule 133" hearing, and consisted of a review of documentary evidence, and an elicitation of further statements from the complainants, respondents herein, and the petitioner. The Board then rendered their decision exonerating petitioner from any misconduct.[4]

In the year of their efforts to have petitioner removed from his occupation and employment, respondents attempted to enlist the aid of others, and repeated their scurrilous charges to them.

Respondents first alluded to the federal questions here involved in their Answer to plaintiff's First Amended Complaint,[4a] This defense was largely ignored except by the appellate Court's oblique reference to the Constitutional guarantee of freedom of speech, as noted on page 12 of this Brief.

Petitioner asserts a denial of his constitutional rights from the Court proceeding and Opinion herein, and therefore did not suggest a federal question by his initial pleadings. Instead, he raised that issue based upon judicial, rather than statutory violation of his rights guaranteed by the Constitution, as argued[4b] in his Petition for

4 Appendix, Opinion, pg A-4, footnote 1

4a The Answer states: "Plaintiff..by this action seeks to abridge...rights in contravention of..the Constitution of the United States." as to each cause of action.

4b That Petition argues "Defendants...deprived appellant of his Constitutional rights..without due process of law...the effect of this decision denies appellant equal protection of the law..U.S. Constitution, 1st, 5th & 14th Amend." Petition denied.

Rehearing before the District Court of Appeal, after that Court rendered its decision denying petitioner's fundamental rights.

REASONS FOR GRANTING THE WRIT

I

DIRECTED VERDICT AGAINST PLAINTIFF IN MALICIOUS PROSECUTION CASE WAS ERROR AND CONSTITUTED DENIAL OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, WHERE PROSECUTION IN QUESTION WAS BEFORE A TRIBUNAL HAVING POWER TO ADVERSELY AFFECT LEGALLY PROTECTED INTERESTS OF THE DEFENDANT TO THAT PROCEEDING.

It is well accepted, and the Opinion of the appellate Court concedes, that a Malicious Prosecution action will [redacted] lie as to proceedings before an administrative tribunal, where that forum has the power to adversely affect the legally protected interests of the defendant.[5] The fact that the communication was privileged does not prevent it being an element in an action for Malicious Prosecution.[6]

In this case, not only did the Board of Education have the power to demote the plaintiff upon an adverse determination of the charges against

5 Hardy v. Vial, (1957) 48 C.2d 577; Restatement Torts, § 680

6 Albertson v. Raboff, (1956), 46 Cal.2d 375 Appendix "A", Opinion, pgs A15-A16

him, but also to reassign him to a lesser position with lesser remuneration, as well as prevent his regular promotions. The appellate Court, in its opinion, conceded that the "Board, at the Rule 133 hearing, had the power to affect (plaintiff's) legally protected interests by transfer with the potential of eventual demotion". They declined to reverse the directed verdict as to the Malicious Prosecution cause of action on their determination that the "hearing was primarily investigatory" and the "potential sanction flowing from the hearing was less than could have been imposed if the process went forward", (emphasis added)[7], a rationale seemingly without logic. The effect of the Appellate Court's opinion places petitioner alone in the catagory of individuals who are victims of a malicious prosecution. He is denied his remedy for the respondents' wrong.

It is not merely the appellate Court's inconsistant decision in this case for which review is sought, but rather its affect upon petitioner's constitutional rights as guaranteed by the Fourteenth Amendment. The decision denies petitioner his cause of action for Malicious Prosecution and a fair jural determination of that cause. That "property right" deserves the protection of the due process clause of the Fourteenth Amendment and its

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8 Appellate Court Decision, Appendix, pg A-16

denial by the jural action of California's trial and appellate courts is a proper subject for this court's review.[8]

The State, by the decision here under review, infringed upon petitioner's constitutional rights, and that infringement was as surely exercised by the appellate Court's decision, as would be the case if a Statute had effected a similar result. As this Court affirmed in New York Times v. Sullivan, (1964) 374 U.S. 254, 84 S.C. 710, in holding the application of an Alabama Court of a rule of law to be an unconstitutional infringement of free speech and press: "The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised."[9]

II

DIRECTED VERDICT AGAINST PLAINTIFF IN LIBEL CASE WAS ERROR AND CONSTITUTED DENIAL OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, WHERE PROSECUTION IN QUESTION WAS BEFORE A TRIBUNAL HAVING POWER TO ADVERSELY AFFECT LEGALLY PROTECTED INTERESTS OF THE DEFENDANT TO THAT PROCEEDING.

Defendants raised, and the lower and appellate

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8 Shelley v. Kraemer (1948), 334 U.S. 1

9 Sein Fujii v. California (1952, 38 Cal.2d. 718

Courts applied, the absolute privilege of California Civil Code Section 47 (2) to petitioner's Libel causes of action. That privilege extends to any publication made in legislative, judicial or other proceeding authorized by law,[10] including Administrative Boards and Proceedings.[11] The application of that privilege to the circumstances of this case, denied petitioner his constitutional right to the equal protection of the law. The appellate Court, having found the Rule 133 hearing of insignificant jural stature for the purpose of the Malicious Prosecution case, as previously discussed, now finds that proceeding of sufficient standing to warrant the application of the privilege.

Petitioner, by this abnormality of the law, finds himself in a class of one. If the Rule 133 hearing was, indeed, merely investigatory in nature, its elevation to the status of a jural proceeding, for the purpose of the Libel case, seems inconsistant, and discriminatory to the petitioner. The Opinion does not mention, but suggests the influence of, the First Amendment guarantee of freedom of speech. They held that "there must be an open channel of communication between the persons interested and the forum, unchilled by

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10 Appendix A, Opinion, pg A-7--A-8

11 Ascherman v. Natanson (1972) 23 C.A.3d 861

the thought of subsequent judicial action against such participants; provided always, of course, that such preliminary meetings, conduct and activities are directed toward the achievement of the objects of the litigation or other proceedings ... (citation)" [12] "to accomodate the purpose of the judicial or quasi-judicial proceeding"[13].

But freedom of speech always carries a concurrent burden of responsibility. Respondents' conduct in this case, in their fabrication of the most outrageous charges they could conceive to demean and damage the petitioner, does not deserve the protection of the First Amendment, or the State Statute granting absolute privilege to one who would defame. But there are other impediments to the application of the absolute privilege here.

First, even as to absolute privilege, the defamatory statement must be made to achieve the object of the proceeding. Respondents acted always in an exercise of illwill toward petitioner, and solely to deny him his livelihood.[14]

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12 Appendix A, Opinion, pg A-12

13 Appendix A, Opinion, pg A-11

14 In November, Respondents asked for further proceedings, after the Board had concluded its investigation with a determination exonerating petitioner. They closed their letter to the Board by their statement: "In the alternative, if the Board, in its opinion, feels that it now has sufficient cause and that its responsibility

California has limited the application of its absolute privilege statute to permit inquiry as to the state of mind and purpose of the person seeking to invoke the immunity of that statute. Thus, in Bradley v. Hartford Accident & Indemnity Co., 30 C.A.3d 818, 106 C.Rptr. 718, the Court held that abuse of the privileged proceeding did not warrant the application of the privilege. There, as here, the defamatory writings were not made to achieve the objective of the proceedings, but were gratuitous attempts to vilify. And determination of such abuse of the privileged occasion has always been a jury question, not properly a subject for the directed verdicts imposed here.[15]

Finally, there were excessive publications of defamatory matter in this case, as discussed in the Opinion,[16] although the appellate Court found such excess publications to also be privileged.

As stated in Bradley v. Hartford, supra:

"In determining whether or not the defamatory publication would be accorded in absolute privilege . . . special emphasis must be laid on

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requires it to dismiss Mr. Brody at this juncture without a hearing, as a result of the violation by him of Sec. 13013 of the Education Code, we would have no objection to such summary action by the Board and would consider the matter closed." Exhibit 28, R. 971, 971

15 Frisk v. Merrihew, (1974) 42 C.A.3d 319,

16 Appendix A, Opinion, pgs A-10--A-14

the requirement that it be made in furtherance of the litigation and to promote the interest of justice." (at 826)

Here, the respondents' conduct was neither in furtherance of any legitimate litigation, nor calculated to promote the interest of justice.

III

DIRECTED VERDICT AGAINST PLAINTIFF IN A CONSPIRACY TO INTERFERE WITH PROSPECTIVE ECONOMIC ADVANTAGE CASE WAS ERROR, AND CONSTITUTED DENIAL OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, WHERE PROSECUTION IN QUESTION WAS BEFORE A TRIBUNAL HAVING POWER TO ADVERSELY AFFECT LEGALLY PROTECTED INTERESTS OF THE DEFENDANT TO THAT PROCEEDING.

The trial and appellate Court dismissed petitioner's cause of action for Conspiracy to Interfere with his Prospective Economic Advantage, by their finding of privilege as to respondents' defamatory pleadings and papers filed in connection with the Rule 133 Hearing. Respondents admit their common scheme and plan to take from petitioner his occupation and livelihood. All of their conduct concerning the petitioner in the year following the arrest of their sons, was done and performed pursuant to that conspiracy. But this Court has long recognized that the right to engage in a lawful occupation and earn one's

livelihood is one of the most fundamental and invulnerable rights guaranteed by, and within the protection of, the due process clause of the Fourteenth Amendment to the Constitution.[20] No State law, statute, ruling, regulation or precedent should be permitted to abrogate that right.[21] Here, the respondents spared no effort to deprive plaintiff of that fundamental right, and their frantic efforts submitted petitioner to a persecution rarely seen in our society. Their conduct does not warrant the protection of the State, nor the indulgness of the Courts. Their conduct transcended the proceedings they brought before the Board of Education, and perverted the purpose of that proceeding. They slandered the petitioner at every opportunity. They falsely assailed petitioner's conduct, ability and reputation, to his peers and his superiors. Endorsement of their conduct by the California Courts abrogates petitioner's constitutional rights, and denies him due process of law.

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[20] Traux v. Raich (1915), 239 U.S. 33, which states: "the right to work for a living in the common occupation of the community is of the very essence of the personal freedom and opportunity that it was the purpose of (the Fourteenth) Amendment to secure."

[21] Endler v. Schutzbank, (1968) 68 C.2d 162; 65 C.Rptr. 297

CONCLUSION

Respondents of this case subjected petitioner to an ordeal of false accusations and spurious proceedings in an exercise of passion and illwill and to deny petitioner his right to pursue his livelihood. The proceedings in the California Courts protected the defendants and denied petitioner redress for their wrongful conduct. The judicial proceedings of this case denied petitioner his constitutional rights to due process and the equal protection of the law. Only this Court can now declare the proceedings the State Courts in violation of petitioner's rights guaranteed by the First and Fourteenth Amendments to the United States Constitution.

Petitioner respectfully prays that a Writ of Certiorari issue from this Court to review the decision and opinion of the California Court of Appeal, and to hold and determine the directed verdict, Judgment and appellate Court Decision in this case in violation of petitioner's constitutional rights to due process and the equal protection of the law.

Petitioner further prays that the directed verdict, Judgment and Decision of the California Courts in this case be reversed and the cause remanded back to the California trial Court for a

trial on the merits and an adjudication by a duly constituted trier of facts.

DATED: June 26, 1979

Respectfully submitted,

JACQUE BOYLE
Attorney for Petitioner

APPENDIX "A"

APPENDIX

Opinion.

Eugene Brody, Appellant, v. Francis Montalbano, et al., Respondents. (L.A. No. 77527, Dec. 22, 1978.)

COUNSEL

Jacque Boyle for Appellant.

Frieman, Rosenfeld & Zimmerman, and Gary L. Zimmerman, for Respondents.

OPINION

HANSON, J. -- Plaintiff Eugene Brody appeals from a judgment entered pursuant to a directed verdict in favor of defendants Francis Mantalbano, Frances Montalbano, Virginia Westphal, Doris Scobey and Fred J. Scobey as to all causes of action which included, inter alia, defamation, malicious prosecution, conspiracy to interfere with prospective advantage and to defame, and intentional infliction of emotional distress.

Facts

The events giving rise to this litigation grew out of an incident at Le Conte Junior High School involving defendants' three sons and other students.

Defendants' sons were members of a stage crew class of approximately 21 boys. The teacher of the stage crew class, Mr. Autrey, had also been assigned to oversee an audiovisual class which met in another

room at the same time. As a consequence the boys in the stage crew class went unsupervised from time to time as Mr. Autrey alternated his time between the two classes.

Apparently, it was the custom of the stage crew boys to engage in "horseplay," punching and kicking one another, during the periods they were unsupervised. On June 8, 1972, during one unsupervised period, the boys attacked an audio-visual student, James Grant. Unbeknownst to the boys, James had just returned to school after recovering from a head injury or brain concussion. There is no evidence that the boys intended to injure James, but in the scuffle that ensued, James was punched, kicked and either fell or was pushed to the floor from some steps leading out of the auditorium. James lost consciousness for a few minutes. When Mr. Autrey returned and discovered what had transpired in his absence, he assisted James, took him to the nurse's office and ordered the 12 boys to go to the office of Mr. Brody, the Boys' Vice Principal and plaintiff in this case.

The exact sequence of events after the boys arrived at Mr. Brody's office is somewhat uncertain. It is clear, however, that the vice principal did question the boys about the incident and eventually defendants' sons and a fourth boy either admitted

participating in the incident or were implicated by others in the class, or both. In addition, Mr. Brody reported the incident to the police who arrested the four boys, took them into custody, and booked them for battery. No action was taken against the other eight boys in the class. Later that same day police released the arrested boys to their parents, and the boys returned to school after a four-day suspension.

Dissatisfied with the results of subsequent conversations they had had individually with Mr. Brody and/or Dr. Steinberg, the principal at Le Conte, defendant parents met and jointly drafted a letter to the Los Angeles City Board of Education (hereinafter referred to as the Board). Further correspondence ensued between these parents and the Board which culminated when the defendant parents filed with the Board a formal complaint against Mr. Brody on April 18, 1973. Although the grounds for defendants' complaint were set forth at length in an attachment to the formal complaint, their allegations can be summarized as consisting of three principal elements: (1) Mr. Brody made inappropriate comments and threats to defendants' sons immediately following the incident; (2) Mr. Brody called police without an appropriate preliminary investigation; and (3) Mr. Brody failed to call the parents of the

arrested boys.

As a result of this complaint, the Board held a "Rule 133" hearing on June 8, 1973. Unfortunately, no reporter's transcript was made of this proceeding. The Board issued its conclusions on June 29, 1973. The written conclusions of the Board disclose that the Board found certain of the allegations of the defendant parents to be well-founded although it did not hold Mr. Brody to be personally responsible.[1/]

On January 24, 1974, Mr. Brody filed this litigation seeking damages and alleging causes

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1/"Following the presentation of all of the evidence, both oral and documentary, the Board has come to the following conclusions:

"1. That the behavior of the three students was unfortunate and deserving of the suspensions administered by the school;

"2. That the incident involving James Grant was serious and could have been tragic;

"3. That the Vice Principal acted in conformance with administrative procedures and Board Rules;

"4. That the calling of the police was appropriate, but the arrest was probably premature since the boys involved had basically good records and would no doubt have been available if necessary and there was no evidence of premeditation on their part;

"5. That the parents should have been called immediately, in terms not only of the State Code but of desirable administrative practice and human concern;

"6. That the Principal should have involved himself in making certain that the matters related in

of action in malicious prosecution, libel, conspiracy to interfere with prospective advantage, conspiracy to commit slander and/or libel, and intentional infliction of emotional distress. The litigation proceeded to trial by jury and at the conclusion of all of the evidence, defendants' motions for directed verdict and judgment were granted by the trial court. Mr. Brody has appealed from the judgment.

Issues

Mr. Brody contends that the trial court erred in granting defendants' motion for directed verdict because (1) as to the action for defamation,

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No. 5 above were appropriately pursued even if it meant going to the homes of the parents if they could not be reached by telephone;

"7. That, on the basis of known evidence, the Board holds the opinion that the seriousness of the incident does not justify a permanent police record;

"8. That the Board, in principle, would support the parents in requesting a sealing and expungement of the records as provided in law. See Penal Code Section 1203.45;

"9. That the absence of close supervision in the auditorium during stage crew time had previously led to infractions of the rules by the students and that the school administrators should make certain that appropriate certificated supervision is present during any student class activity or enterprise; and finally

"10. That the Board has no reason to believe that Mr. Brody's position on racial and ethnic issues is or has ever been anything but honorable."

the statements by the defendant parents were not privileged; (2) as to the action for malicious prosecution, defendants' filing of a complaint with the Board with the allegations therein made showed malice; (3) as to the claim for interference with prospective advantage, substantial evidence established his right to recovery because the defendant parents' statements were not privileged; and (4) as to the action for intentional infliction of emotional distress, the evidence showed the statements of the defendant parents were not privileged.

Discussion

The sole issue presented on this appeal is whether defendants' motions for directed verdict were properly granted.

"A . . . directed verdict may be granted 'only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff if such a verdict were given.' (Citations.) Unless it can be said as a matter of law, that, when so considered, no other reasonable conclusion is legally deducible from the evidence, and that any other

holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from the jury. (Citation.) . . . the function of the trial court on a motion for a directed verdict is analogous to . . . that of a reviewing court in determining, on appeal, whether there is evidence in the record of sufficient substance to support a verdict. Although the trial court may weigh the evidence and judge of the credibility of the witnesses on a motion for a new trial, it may not do so on a motion for a directed verdict." (Estate of Lances (1932) 216 Cal. 397, 400-401; Dailey v. Los Angeles Unified Sch. Dist. (1970) 2 Cal.3d 741, 745.) In accord with these principles, we accept as true the evidence in the record which is most favorable to plaintiff. (Taylor v. Centennial Bowl, Inc. (1966) 65 Cal.2d 114, 117; Dailey v. Los Angeles Unified Sch. Dist., supra, 2 Cal.3d at p. 745.)

I

Plaintiff-appellant Brody contends that he was defamed by the statements published by defendant parents. Civil Code section 47, subdivision (2), renders absolutely privileged (Albertson v. Raboff (1956) 46 Cal.2d 375, 379) a publication made "In any (1) legislative or (2) judicial proceeding, or

(3) in any other official proceeding authorized by law; . . . ."

The statutory phrase "in any other official proceeding authorized by law" has been broadly interpreted to include those proceedings which resemble judicial and legislative proceedings, such as transactions of administrative boards and proceedings which are quasi-judicial or quasi-legislative in nature. (Ascherman v. Natanson (1972) 23 Cal.App.3d 861, 865.)

In Martin v. Kearney (1975) 51 Cal.App.3d 309, a school teacher, Henriette Martin, brought an action against the parents of two of her students based on allegedly libelous statements made by defendants in letters to the principal. This court concluded that letters sent to the employer of a school teacher, which are designed to prompt official action with respect to the conduct of that person as a school teacher, are absolutely privileged under Civil Code section 47, subdivision (2). (Id., at p. 311.) Accordingly, defendant parents' communications with the Board in the instant case, which were intended to prompt official action on the part of the Board with respect to Mr. Brody's conduct as an administrator, are absolutely privileged.

Moreover, the existence of an absolute privilege is not dependent upon a finding that the Rule 133 hearing on June 8, 1973, constituted an "offi-

cial proceeding," since communications to an official agency, which are designed to induce the agency to initiate action, are as much a part of the "official proceeding" as communications made after the agency commences proceedings. (Martin v. Kearney, supra, 51 Cal.App.3d 309, 311; King v. Borges (1972) 28 Cal.App.3d 27, 34.) Therefore, all of the communications of defendant parents with the Board, beginning with their letter of July 3, 1972, and culminating with the hearing on June 8, 1973, were absolutely privileged.[2/]

Mr. Brody contends that even if the communications between the parents and the Board were privileged, the defendant parents made other defamatory publications which were not related to the official proceedings, and which were, therefore, not privileged.

The nature of the privilege is such that absolute immunity attaches if: "the publication (1) was made in a judicial proceeding; (2) had some connection or logical relation to the action;

2/

Because we conclude that the conduct of the defendant parents was privileged under Civil Code section 47, subdivision 2, Mr. Brody's allegation of a conspiracy adds nothing and does not vitiate the privilege. (Thornton v. Rhoden (1966) 245 Cal.App.2d 80, 93-94; Pettitt v. Levy (1972) 28 Cal.App.3d 484, 491.)

(3) was made to achieve the objects of the litigation; and (4) involved litigants or other participants authorized by law." (Bradley v. Hartford Acc. & Indem. Co. (1973) 30 Cal.App.3d 818, 825.)

Underlying the absolute privilege is a recognition of the importance of providing utmost freedom of communication between citizens and public authorities whose responsibility is to investigate wrongdoing. (Imig v. Ferrar (1977) 70 Cal.App.3d 48, 55.) Accordingly, any doubt as to whether the necessary connection between the publication and the action exists is to be resolved in favor of a finding of privilege. (Twyford v. Twyford (1976) 63 Cal.App.3d 916, 926; Thornton v. Rhoden (1966) 245 Cal.App.2d 80, 93.)[3/]

The foregoing principles are applicable to those publications which Mr. Brody argues were unrelated to defendant parents' communications with the Board. These include: (1) the discussion

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At oral argument and by subsequent letters authorized by the court, the parties have referred to the consideration of this issue in Tiedemann v. Superior Court (1978) 83 Cal.App.3d 918, and Umansky v. Urquhart (1978) 84 Cal.App.3d 368. Since hearing was granted by the California Supreme Court in the Tiedemann case and it was retransferred to the Court of Appeal for future decision, it cannot be considered at this time. The principles set forth in Umansky are consistent with those expressed herein.

by the parents of their complaints against Mr. Brody with Mr. and Mrs. Grant and with Mrs. Evans; (2) the exposure of Mr. Scobey's secretary who typed the correspondence which defendant parents sent to the Board; and (3) the notarization of the defendant parents' complaint.

The defendant parents met twice with Mr. and Mrs. Grant, the parents of James Grant. The purpose of their first visit was to determine whether Mr. Grant would testify at the upcoming Board hearing. Defendant parents also met with Mrs. Evans. As the mother of the fourth boy arrested, Mrs. Evans had a direct interest in the correspondence these parents had with the Board. Although she was not a party to the formal complaint filed with the Board, Mrs. Evans did sign two of the earlier letters which the defendant parents sent to the Board.

It appears that the privilege extended to the defendant parents' communications with Mr. and Mrs. Grant and with Mrs. Evans. "To accomplish the purpose of judicial or quasi-judicial proceedings, it is obvious that the parties or persons interested must confer and must marshal their evidence for presentation at the hearing. The right of private parties to combine and make presentations to an official meeting and, as a necessary incident thereto, to prepare materials

to be presented is a fundamental adjunct to the right of access to judicial and quasi-judicial proceedings. To make such preparations and presentations effective, there must be an open channel of communication between the persons interested and the forum, unchilled by the thought of subsequent judicial action against such participants; provided always, of course, that such preliminary meetings, conduct and activities are directed toward the achievement of the objects of the litigation or other proceedings. . . ." (Pettitt v. Levy (1972) 28 Cal.App.3d 484, 490-491.)

With regard to the publication to Mr. Scobey's secretary, Mr. Scobey testified that handwritten drafts of defendant parents' letters to the Board were given to his secretary for typing, solely for the purpose of insuring that they would be in a legible form for transmission to the Board. There was no evidence controverting this assertion. Obviously, defendant parents could have submitted handwritten letters to the Board. However, it is customary for business correspondence to be typed and therefore, defendant parents' action seems reasonably necessary for this purpose.

The California Legislature has recognized that disclosure of confidential communications to secretarial help is reasonably necessary to accomplish

the transmission of the information, hence such disclosure will not destroy the privilege. (See Evid. Code, Sections 952 (Lawyer-client privilege), 992 (physician-patient privilege), 1012 (psychotherapist-patient privilege).) There was no loss of the privilege by virtue of the fact that the documents typed by the secretary were unrelated to Mr. Scobey's business. In order to partake of the absolute privilege a publication need not be pertinent, relevant or material in a technical sense to any issue in the action; it need only have some connection or relation to the proceedings. (Thornton v. Rhoden, supra, 245 Cal.App.2d 80, 90; Ascherman v. Natanson, supra, 23 Cal.App. 3d 861, 865; Pettitt v. Levy, supra, 28 Cal.App.3d 484, 489.) It is clear that such a connection was established here.

The defendant parents had the complaint form which they received from the Board notarized even though the form itself stated they were signing under penalty of perjury. Mr. Brody argues that this amounts to an excessive publication by which the absolute privilege claimed by defendant parents was lost. Although Mr. Brody's arguments presume there was a publication to the notary, the evidence shows that actually none occurred. The notary's seal appears on page 2 of the complaint form. However, there is neither a reference to

Mr. Brody's name nor to the defendants' charges against him on this page. All details of the complaint against Mr. Brody were contained in an attachment to the form provided by the Board. Furthermore, Mr. Scobey testified that the notary did not read the complaint, and Mr. Brody offered no evidence which contradicted Mr. Scobey's testimony.[4/]

II

We turn secondly to plaintiff-appellant's contention that the trial court erred in its determination that evidence of malicious prosecution was insufficient because of the nature of the proceeding upon which it was based.

California has adopted the position of section 680 of the Restatement of Torts that an action for malicious prosecution may be founded upon a proceeding instituted before an administrative agency as well as a judicial proceeding. (Hardy v. Vial (1957) 48 Cal.2d 577, 590-581.) That section pro-

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It should be noted that the result would not differ if a publication were found. Although it might appear that defendants displayed excessive caution in having the document notarized in their desire to assure exact compliance with Board rules, nonetheless since their action was related to the official proceedings, the privilege attached.

vides that one who takes an active part in the initiation, continuation or procurement of civil proceedings against another before an administrative board that has power to take action adversely affecting the legally protected interests of the other is subject to liability for any special harm caused thereby, if (a) he acts without probable cause to believe that the charge or claim on which the proceedings are based may be well founded, and primarily for a purpose other than that of securing appropriate action by the board, and (b) the proceedings have terminated in favor of the person against whom they are brought.

Moreover, the fact that "a communication may be absolutely privileged for the purposes of a defamation action does not prevent its being an element of an action for malicious prosecution in a proper case. The policy of encouraging free access to the courts that underlies the absolute privilege applicable in defamation actions is outweighed by the policy of affording redress for individuals wrongs when the requirements of favorable termination, lack of probable cause, and malice are satisfied." (Albertson v. Raboff (1956) 46 Cal.2d 375, 382; Imig v. Ferrar, supra, 70 Cal. App.3d 48, 57.)

Mr. Brody alleges in his complaint that the foregoing requirements were met in that a formal

administrative proceeding was instituted against him as a result of defendant parents' complaint, that the accusations contained in the complaint were made without probable cause and were motivated by malice, and that he was exonerated of misconduct at the hearing. From the record before us, however, it appears that no formal proceedings were initiated by the Board against Mr. Brody since the results of its investigation pursuant to procedures established by Rule 133 convinced the Board that, although the handling of the situation left something to be desired, Mr. Brody had acted in conformance with administrative procedure and Board rules.

A mere investigation which does not lead to the initiation of proceedings before an administrative board having the power to take action adversely affecting legally protected interests of the accused is not a sufficient basis upon which to found a malicious prosecution action under Hardy v. Vial, supra, 48 Cal.2d 577. (Imig v. Ferrar, supra, 70 Cal.App.3d 48, 58.)

The Imig court declared that a special rule applies where governmental action of an administrative character is a prelude to further more formal administrative proceedings. In that situation, despite the administrative power to affect a legally protected interest at the preliminary

stage, the process is still deemed investigatory so long as investigation is the primary purpose and the power to impose sanctions is substantially more limited than available in the more formal administrative process to which the first stage is a prelude. If the investigation is terminated at the first stage, Imig holds that no proceeding has been initiated. (70 Cal.App.3d at p. 60.)

Here the Rule 133 hearing conducted by the Board was a prelude to the possibility of administrative action of a more formal nature pursuant to the detailed provisions of the Education Code dealing with the removal and other discipline of certificated employees. Here, while the Board at the Rule 133 hearing had the power to affect legally protected interests by transfer with the potential of eventual demotion, the function of the hearing was primarily investigatory and the potential sanction flowing from the hearing itself was much less than could be imposed if the process went forward. Here the process did not go forward but terminated at the Rule 133 hearing without action adverse to Mr. Brody. Thus, as in Imig where a complaint to a police chief whose power to impose discipline upon the subject of the complaint included the right to suspend the subject for 30 days or to invoke a board of rights hearing to seek a greater sanction was deemed not to

initiate a proceeding (70 Cal.App.3d 48, 60.), defendants' complaint here must be treated as having triggered an investigation but not a proceeding as the latter is required if there is to be a legally cognizable right to redress for malicious prosecution.

Mr. Brody argues, however, that if the privilege for official proceedings applies to his defamation cause of action, then it follows that there were official proceedings for purposes of malicious prosecution. This contention ignores the fact, previously discussed, that the absolute privilege attaches to publications preliminary to official proceedings, which publications are intended by the author to initiate official action. (Ascherman v. Natanson, supra, 23 Cal.App.3d 861, 865.) However, to justify recovery for malicious prosecution, there must actually have been an initiation of civil proceedings against another before an administrative board. If, as in the instant case, the publication does not lead the official agency to initiate such proceedings, the plaintiff has not suffered the type of injury for which a malicious prosecution action lies. (Imig v. Ferrar, supra, 70 Cal.App.3d 48, 58-59.) The fact that Mr. Brody had to undergo a certain amount of inconvenience to persuade the Board that the charges against him were unfounded is not in

itself sufficient to justify a malicious prosecution action. (Id., at p. 59.)

III

Mr. Brody contends that the trial court erred in granting defendants' motion for directed verdict on the grounds that conduct privileged under Civil Code section 47 may not be utilized as the basis for a claim of interference with prospective advantage.

It has been determined that justification for interference with contractual relations is closely analogous to privilege in defamation, and that the tort of inducing breach of contract cannot be used to close the channel of communication through which citizens may express their grievances to public officials. (Bledsoe v. Watson (1973) 30 Cal.App.3d 105, 110.) It having been previously determined that defendants' conduct was privileged, we conclude that Mr. Brody is precluded from utilizing it as the basis of an action for interference with prospective advantage.

In addition to the matter of privilege, Mr. Brody has failed to sustain his burden of proof to show that, except for defendants' conduct, there was a reasonable probability that an economic advantage would have accrued to him. (Campbell v. Rayburn (1954) 129 Cal.App.2d 232, 234; Wilson v. Loew's, Inc. (1956) 142 Cal.App.2d 183, 190.) Mr.

Brody introduced evidence that he was ranked third on a list of 10 candidates for a position as a secondary opportunity principal, that he was not offered such a position during the period the list remained in force (Mar. 1972 to Mar. 1974), and that the persons ranked first, second and eighth were selected as secondary opportunity principals in June 1972. This occurred prior to the time the defendants sent their letter to the Board. Mr. Brody admitted that he did not know why he was not appointed. This does not constitute evidence of sufficient substantiality to support a verdict in favor of plaintiff-appellant and therefore, the trial court did not err in granting a motion for directed verdict as to this cause of action.

IV

Plaintiff-appellant further contends that the trial court erred in granting defendants' motions for directed verdict on the basis that conduct which is privileged under Civil Code section 47 may not form the basis for an intentional infliction of emotional distress action.

Underlying the privilege conferred by Civil Code section 47 is the important public policy of affording the utmost freedom of access to the courts. (Albertson v. Raboff, supra, 46 Cal.2d 375, 380.) To allow plaintiff to proceed with a cause of action for intentional infliction of

emotional distress would operate as a severe deterrent to communications otherwise protected and would thereby substantially defeat the purpose of the privilege. (Lerette v. Dean Witter Organization, Inc. (1976) 60 Cal.App.3d 573, 579.) Therefore, California permits no cause of action based upon the defamatory nature of a communication which is itself privileged under the defamation laws. (Agostini v. Strycula (1965) 231 Cal.App.2d 804, 808; Kachig v. Boothe (1971) 22 Cal.App.3d 626, 641; Lerette v. Dean Witter Organization, Inc., supra, 60 Cal.App.3d at p. 579.)

Disposition

The judgment is affirmed.

HANSON, J.

We concur:

LILLIE, Acting P. J.

THOMPSON, J.

APPENDIX "B"

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APPENDIX B

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102
MAR 29 1979
I have this day filed Order HEARING DENIED
In re: 2 Civ. No. 53359
BRODY
-vs-
MONTALBANO, et al.

Respectfully,

G. E. BISHEL,
Clerk

(Note: Dissent of denial of hearing by Newman, J. of the California Supreme Court is noted at page 215 of the 150 C.Rptr. text of this case.)

- PROOF OF SERVICE BY MAIL -

JACQUE BOYLE, declares and states:

That I am a member of the Bar of the Supreme Court of the United States. That I am not a party to the within action and my business address is 707 Wilshire Boulevard, Suite 4670, Los Angeles, California 90017. On June 26, 1979, I served the within Petition for a Writ of Certiorari to the Supreme Court of California and on all parties involved in said action, by placing three copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed follows:

GARY L. ZIMMERMAN
Attorney At Law
9100 Wilshire Boulevard
Beverly Hills, California 90212

HONORABLE THOMAS W. LeSAGE, Judge
Superior Court, Los Angeles County
111 North Hill Street
Los Angeles, California 90012

CLERK OF THE COURT OF APPEALS OF THE
STATE OF CALIFORNIA, 2ND APPELLATE DIST.
3580 Wilshire Boulevard, Room 301
Los Angeles, California 90010

CLERK OF THE SUPREME COURT OF THE
STATE OF CALIFORNIA
3580 Wilshire Boulevard, Room 213
Los Angeles, California 90010

I declare under penalty of perjury, that the foregoing is true and correct. Executed June 26, 1979 at Los Angeles, California.

Jacque Boyle

JACQUE BOYLE, Declarant
Attorney for Petitioner